

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
 BARRY P. LUNDERVILLE,)
 COLLEGE CREEK BROADCASTING, INC.,)
 and)
 CUMULUS LICENSING LLC)
)
 Petition for Reconsideration)
)
)
 CONNOISSEUR MEDIA, LLC)
)
 Application for Review)
)
)
 NASSAU BROADCASTING HOLDINGS, INC.)
)
 Petition for Reconsideration)
)

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 2013

Released: January 14, 2013

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we uphold a Wireless Telecommunications Bureau (“Bureau”) decision denying requests from five bidders in an auction of FM broadcast construction permits for relief from the payment obligations arising from their withdrawals of provisionally winning bids. The Commission’s rules require a bidder that withdraws a provisionally winning bid during an auction to pay the difference between the withdrawn bid and the subsequent winning bid if the subsequent winning bid is less than the withdrawn bid.¹ Based on the circumstances, we find application of the bid withdrawal rule appropriate and affirm the Bureau denials of petitioners’ requests for relief from the owed bid withdrawal payments.

II. BACKGROUND

2. We have before us three related pleadings: (1) an application for review filed by Connoisseur Media, LLC (“Connoisseur”);² (2) a petition for reconsideration filed by College Creek Broadcasting, Inc. (“College Creek”), Cumulus Licensing LLC (“Cumulus”), and Barry P. Lunderville

¹ 47 C.F.R. § 1.2104(g)(1).

² Application for Review filed by Connoisseur Media, LLC, on August 1, 2008 (“Connoisseur AFR”). Connoisseur Media, LLC, participated in Auction 37 under its former name, Bigglesworth Broadcasting, LLC (“Bigglesworth”). Public notices and other documents associated with the auction therefore refer to the company as Bigglesworth.

(“Lunderville”) (collectively, the “Joint Parties”);³ and (3) a petition for reconsideration filed by Nassau Broadcasting Holdings, Inc. (“Nassau”).⁴ Each is seeking reconsideration or review of an order by the Bureau denying their requests for relief of payment obligations arising from their withdrawn bids in a 2004 auction of FM broadcast construction permits (Auction 37).⁵ Because similar facts and issues are raised in these pleadings, we consolidate these requests for resolution.⁶

A. The Bid Withdrawal Payment Rule, Auctions 37 and 62, and the Petitioners’ Bid Withdrawal Payment Obligations

3. When establishing the procedures for a particular auction, the Commission may, under the competitive bidding rules, elect to allow bidders to withdraw provisionally winning bids prior to the close of the auction. If bid withdrawals are allowed in an auction, bidders that withdraw bids must pay the difference between the withdrawn bid and the subsequent winning bid, if the subsequent winning bid was less than the withdrawn bid.⁷ No payment is owed if the subsequent winning bid is more than the withdrawn bid.

4. The bid withdrawal payment requirement is integral to the fulfillment of the statutory objectives set forth in the grant of the Commission’s authority to award licenses by auction.⁸ By forcing each bidder to consider carefully the costs that may be incurred by withdrawing a bid, the rule deters “insincere bidding” that may interfere with auction dynamics, including by distorting price information.⁹ Regardless of bidder motives, insincere bids can reduce the efficiency of the competitive bidding mechanism. This damage to the auction process is particularly great later in the auction, “because other bidders have fewer opportunities to adjust their strategies and thus there is less . . . chance the license will

³ Petition for Reconsideration filed by College Creek Broadcasting, Inc., Barry P. Lunderville, and Cumulus Licensing LLC, on August 1, 2008 (“Joint Parties PFR”).

⁴ Petition for Reconsideration of Denial of Request for Waiver of Bid Withdrawal Penalty Rule filed by Nassau Broadcasting Holdings, Inc., on August 1, 2008 (“Nassau PFR”).

⁵ See Barry P. Lunderville, Connoisseur Media, LLC, College Creek Broadcasting, Inc., Cumulus Licensing LLC, and Kemp Communications, Inc. Request to Reduce Bid Withdrawal Payments; Connoisseur Media, LLC Petition for Reconsideration and Request for Refund of Bid Withdrawal Payment; Nassau Broadcasting Holdings, Inc. Petition for Reconsideration or, in the Alternative, Request for Waiver of Bid Withdrawal Payment Rule, *Order*, 23 FCC Rcd 10390 (WTB 2008) (“*Order*”).

⁶ For convenience, we refer to all of these parties, including Connoisseur, which filed an application for review, as the petitioners.

⁷ 47 C.F.R. § 1.2104(g).

⁸ Such objectives include ensuring “efficient and intensive use” of the spectrum being auctioned, 47 U.S.C. § 309(j)(3)(D), in part by awarding licenses “to those who value them most highly.” Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Second Report and Order*, 9 FCC Rcd 2348, 2349 ¶ 5 (1994) (“*Competitive Bidding Second Report and Order*”).

⁹ The Commission adopted the bid withdrawal payment rule to discourage all forms of “[i]nsincere bidding, whether purely frivolous or strategic,” because it recognized that such bidding “distorts the price information generated by the auction process and reduces its efficiency.” *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373 ¶ 147. *Accord*, Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission’s Competitive Bidding Rules and Procedures, WT Docket No. 05-211, *Report and Order*, 21 FCC Rcd 891, 901 ¶ 26 (2006) (“*CSEA Report and Order*”). The Commission found that bids withdrawn for strategic purposes (e.g., withdrawals made to advance a bidder’s anti-competitive interests in the auction or the marketplace) can be particularly harmful to the auction process. However, the Commission also recognized that non-strategic behavior related to actual bids may also cause such harms. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373 ¶ 147. As a result, our rule focuses not on reasons for the withdrawal, but on the damage such withdrawal would have on the competitive bidding mechanism. Moreover, bidders’ motivations for placing or withdrawing particular bids are generally unverifiable.

be awarded to the bidder who values it most highly.”¹⁰ Whatever the reason for such bids, the bid withdrawal payment requirement “compels bidders who may ultimately withdraw to consider the external consequences of both how much they bid and the timing of their withdrawal.”¹¹ Setting bid withdrawal payments at an appropriate level also “precisely” protects the government from the loss of revenue associated with bid withdrawals.¹²

5. Prior to Auction 37, the Wireless Telecommunications Bureau and the Media Bureau (collectively, “Bureaus”) jointly released a public notice outlining the terms, conditions, and procedures for the auction.¹³ As in many previous auctions, the Bureaus announced that each bidder would be allowed to make limited use of bid withdrawals in Auction 37. Specifically, each bidder would be permitted to withdraw a high bid in no more than two rounds, subject to potential liability under section 1.2104(g).¹⁴ The Bureaus explained in the *Auction 37 Procedures Public Notice* that a “high bidder that withdraws its standing high bid from a previous round during the auction is subject to the bid withdrawal payments specified in [section] 1.2104(g).”¹⁵ The *Auction 37 Procedures Public Notice* also described how interim and final bid withdrawal payments would be calculated under section 1.2104(g)(1): if a high bid were to be withdrawn during the auction, the bid withdrawal payment would be the difference between the withdrawn bid and the subsequent winning bid for the license or permit.¹⁶ If the permit remained unsold at the end of the Auction 37, an interim bid withdrawal payment would be assessed, and the final bid withdrawal payment would be calculated once the permit sold in a subsequent auction.¹⁷ At the time of Auction 37, section 1.2104(g)(1) provided that the interim bid withdrawal payment would be three percent of the withdrawn bid.¹⁸

6. Auction 37 began on November 3, 2004, and concluded on November 23, 2004. During the auction, each of the five petitioners in this case withdrew provisionally winning bids. The six withdrawn bids at issue here, all of which were withdrawn in later rounds (i.e., second half) of the auction,¹⁹ all involved permits that remained unsold at the close of Auction 37.²⁰ Because the permits

¹⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373-74 ¶ 151.

¹¹ *Id.*

¹² *Id.* at 2374 ¶ 152.

¹³ Auction of FM Broadcast Construction Permits Scheduled for November 3, 2004; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures, *Public Notice*, 19 FCC Rcd 10570 (WTB/MB 2004) (“*Auction 37 Procedures Public Notice*”).

¹⁴ *Id.*, 19 FCC Rcd at 10602-04.

¹⁵ *Id.* at 10603. Section 1.2104(g) provides, *inter alia*, that “the Commission will impose payments on bidders who withdraw high bids during the course of an auction.” 47 C.F.R. § 1.2104(g).

¹⁶ 47 C.F.R. § 1.2104(g)(1); *Auction 37 Procedures Public Notice*, 19 FCC Rcd at 10603.

¹⁷ As the *Auction 37 Procedures Public Notice* explained, the interim payment is applied toward any final bid withdrawal payment that is assessed after the construction permit is sold. *Auction 37 Procedures Public Notice*, 19 FCC Rcd at 10604. Where a bid that is higher than the withdrawn bid is subsequently submitted in the same auction, no bid withdrawal payment is assessed. 47 C.F.R. § 1.2104(g)(1); *Auction 37 Procedures Public Notice*, 19 FCC Rcd at 10603.

¹⁸ In 2006, the Commission amended 47 C.F.R. § 1.2104(g)(1) to raise the 3 percent limit on interim bid withdrawal payments to 20 percent. In doing so, the Commission again noted that bid withdrawals “weaken the integrity of the auctions process and impede the deployment of service to the public.” *CSEA Report and Order*, 21 FCC Rcd at 901-04 ¶¶ 24-32. The Commission, as part of its determination of competitive bidding procedures in advance of each auction, now establishes the appropriate level, from 3 percent up to a maximum of 20 percent, at which to set interim bid withdrawal payments. *Id.* at 903-04 ¶ 31.

¹⁹ The withdrawn bids at issue here started in Round 33 and occurred until the end of the auction, following the final round, Round 62. See *Order*, 23 FCC Rcd at 10392 ¶ 4. The Appendix to this Memorandum Opinion and Order (Appendix) lists, for each petitioner, the amount of the withdrawn bid in Auction 37, the winning bid in Auction 62,

(continued....)

remained unsold, the Bureau imposed interim bid withdrawal payments of three percent of the withdrawn bids, as then required by section 1.2104(g).²¹

7. Each of the permits in question received a winning bid in Auction 62, a subsequent auction of FM broadcast construction permits held in January 2006.²² In the public notice announcing the close of the bidding in Auction 62, the Bureaus set forth the final bid withdrawal payment obligations for bidders that had withdrawn bids in Auction 37 on construction permits that had sold in Auction 62, including the petitioners.²³ Pursuant to section 1.2104(g)(1), each of these amounts was the difference between the withdrawn bid and the lower subsequent winning bid for the permit (less the amount originally withheld for the interim bid withdrawal payment).²⁴ The public notice stated that “[f]orthcoming orders will assess such payments and will set forth due dates for the payment of any such obligations.”²⁵ The Bureau’s Auction and Spectrum Access Division (“Division”) later issued a payment demand letter to each petitioner, setting forth the amount of its final bid withdrawal payment obligation(s) and providing instructions for payment of the amount owed, after subtracting its interim bid withdrawal payment(s), within 30 days of the date of the letter.²⁶

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the final bid withdrawal payment, amount of interim payment, amount owed after interim payment, and the total amount paid to date. College Creek and Cumulus also withdrew other bids during Auction 37 that are not at issue here because either the subsequent bids were higher and no bid withdrawal payment was required or the petitioners paid the bid withdrawal payments and did not seek relief for those payments.

²⁰ See FM Broadcast Construction Permits Auction Closes; Auction No. 37 Winning Bidders Announced; Payment and Application Deadlines Established, *Public Notice*, 20 FCC Rcd 1021, Attachment A (WTB/MB 2004) (“*Auction 37 Winning Bidder Public Notice*”).

²¹ These interim bid withdrawal payments were announced on December 1, 2004, in a public notice announcing the close of the bidding in Auction 37. *Id.*, Attachment C. See also Appendix. Pursuant to 47 C.F.R. § 1.2104(g)(1), these amounts were deducted from the upfront payments the petitioners had submitted to qualify for participation in Auction 37.

²² Auction of FM Broadcast Construction Permits Closes; Winning Bidders Announced for Auction No. 62, *Public Notice*, 21 FCC Rcd 1071, Attachment A (WTB/MB 2006) (“*Auction 62 Winning Bidder Public Notice*”). See Appendix for the winning bid amounts for each permit.

²³ *Auction 62 Winning Bidder Public Notice*, 21 FCC Rcd at 1100. See Appendix for final bid withdrawal payments owed by each petitioner as well as the total each petitioner has paid to date.

²⁴ 47 C.F.R. § 1.2104(g)(1) (“In the event that a bidding credit applies to any of the bids, the bid withdrawal payment is either the difference between the net withdrawn bid and the subsequent net winning bid, or the difference between the gross withdrawn bid and the subsequent gross winning bid, whichever is less.”). In the case of Connoisseur, the permit upon which it withdrew in Auction 37 was subsequently won by “a company commonly owned by Connoisseur” in Auction 62 and it was that sister company’s significantly lower winning bid which “result[ed] in the withdrawal payment at issue here.” Connoisseur AFR at 6.

²⁵ *Auction 62 Winning Bidder Public Notice*, 21 FCC Rcd at 1074.

²⁶ Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Barry P. Lunderville, dated October 31, 2006; Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Jeffrey D. Warshaw, Bigglesworth Broadcasting, LLC, dated October 31, 2006; Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Neal J. Robinson, President, College Creek Broadcasting, Inc., dated October 31, 2006; Letter from Rita Cookmeyer, Financial Policy Analyst, Auctions and Spectrum Access Division, Wireless Telecommunications Bureau, Federal Communications Commission, to Lewis W. Dickey, Cumulus Licensing LLC, dated October 31, 2006.

B. The Petitioners' Requests for Relief and the Bureau's Order

8. After the Division issued the payment demand letters, each of the petitioners filed pleadings, either individually or jointly, seeking reduction or cancellation of its assessed bid withdrawal payment.²⁷ The Bureau addressed the pleadings in a consolidated order, finding that, notwithstanding the different ways in which each of the petitioners styled its request for either reduction or cancellation of its bid withdrawal payment, all of the petitions were effectively seeking waiver of section 1.2104(g) of the Commission's rules.²⁸ The Bureau found that none of the petitioners had demonstrated any basis for such a waiver.²⁹ The petitioners now seek reversal of the Bureau's decision. As noted above,³⁰ one of these pleadings is an application for Commission review, while the two others are petitions for reconsideration filed with the Bureau. Because of the related nature of the issues, the Bureau has referred the latter two for our consideration,³¹ and we address all three on a consolidated basis.

III. DISCUSSION

9. An application for review of a final action taken on delegated authority must specify whether such action conflicts with statute, regulation, precedent or established Commission policy; involves a question of law or policy not previously resolved by the Commission; involves application of a precedent or policy that should be overturned; or makes an erroneous finding as to an important or material factual question or a prejudicial procedural error.³² Reconsideration is appropriate only when the petitioner shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters, or as to which consideration is in the public interest.³³ A petition that simply reiterates arguments previously considered and rejected will be denied.³⁴

²⁷ Lunderville, College Creek, Cumulus, and Connoisseur filed a joint request to reduce their bid withdrawal payments. Joint Parties PFR at 3 and n.1. In addition to joining the original joint request, Connoisseur submitted a separate request as a petition for reconsideration of the assessment of its bid withdrawal payment, citing the October 31, 2006, demand for payment letter. Connoisseur AFR at 6-7. Nassau also submitted a petition for reconsideration of the October 31, 2006, demand for payment letter, but also sought or, in the alternative, a request for waiver of section 1.2104(g)(1). Nassau PFR at 2.

²⁸ *Order*, 23 FCC Rcd at 10398 ¶¶ 17-18. The Bureau did not consider the pleadings as petitions for reconsideration of the demand for payment letters sent on October 31, 2006, to the petitioners. The Bureau stated that the letters were ministerial in nature, issued pursuant to 47 C.F.R. § 1.1911 and informing the petitioners of the amount of their final bid withdrawal payments already established under 47 C.F.R. § 1.2104(g)(1) and announced in the *Auction 62 Winning Bidder Public Notice*, and providing them with certain other information about their debt. The Bureau concluded that, because the petitioners had not alleged that these letters contained any errors, they had not provided any basis for reconsideration of the letters. *Order*, 23 FCC Rcd at 10398 ¶ 18.

²⁹ *Id.* at 10398-99 ¶ 20.

³⁰ *See* para. 2 *supra*.

³¹ *See* 47 C.F.R. § 1.106(a)(1).

³² *See* 47 C.F.R. § 1.115. *See also* Application for Review of Declaratory Ruling Issued by the Chief, Cable Services Bureau, In re Jay Lubliner and Deborah Galvin, Potomac, Maryland, *Memorandum Opinion and Order*, 13 FCC Rcd 16107, 16109 ¶ 4 (1998).

³³ 47 C.F.R. § 1.106(c). *See* WQAM License Limited Partnership, *Memorandum Opinion and Order*, 15 FCC Rcd 13549, 13549 ¶ 2 (2000) (citing *WWIZ, Inc.*, 37 F.C.C. 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966)) ("*WQAM License Limited Partnership*").

³⁴ *WQAM License Limited Partnership*, 15 FCC Rcd at 13549 ¶ 2. *See also, e.g.*, Bennett Gilbert Gaines, Interlocutory Receiver for Magic 680, Inc., for Renewal of License for Station WCBM(AM), Baltimore, Maryland, *et al.*, *Memorandum Opinion and Order*, 8 FCC Rcd 3986 ¶ 3 (Rev. Bd. 1993).

10. Petitioners do not dispute that their requests for reduction or cancellation of their bid withdrawal payments should be treated as requests for waiver of section 1.2104(g).³⁵ Petitioners challenge the Bureau's *Order* addressing those requests primarily by arguing that they were not treated similarly to another Auction 37 bidder, Advance Acquisition, Inc. ("Advance").³⁶ However, as discussed below, we find that the Bureau's decision in *Advance* was inconsistent with our precedent allowing waivers of the bid withdrawal payment requirement only in narrow circumstances and was not sufficiently tailored to the policy of our auction rules, and we therefore overrule the Bureau's analysis set forth in *Advance*. The petitioners in this case fail to identify any basis under the foregoing standards for consideration of an application for review or for reconsideration of the order denying their requested relief. Because the Bureau's *Order* appropriately denied those requests for failure to meet the Commission's established waiver standard,³⁷ we deny the instant petitions for reconsideration and application for review.

A. Arguments Based on Bureau's Decision in *Advance*

11. All five petitioners in this case contend that the Bureau unfairly treated their requests for reduction or cancellation of their bid withdrawal payments differently than it treated a similar request involving Advance. Like the petitioners, Advance withdrew a bid in Auction 37, and, because the permit remained unsold at the end of Auction 37, the Bureau assessed an interim bid withdrawal payment.³⁸ The permit received a winning bid in the subsequent FM auction (Auction 62) for an amount lower than Advance's withdrawn bid, resulting in a final bid withdrawal payment obligation for Advance of \$4,616,000.³⁹ Advance sought relief from the application of the bid withdrawal rule and a reduction of its final bid withdrawal payment.⁴⁰

12. In addressing Advance's request, the Bureau found the final bid withdrawal payment in that instance to be "exceptionally high in comparison with previous bid withdrawal payments in that it is the only bid withdrawal payment ever assessed that both exceeds \$4 million and represents more than 200 percent of the [subsequent] winning bid for the permit or license."⁴¹ The Bureau stated that it was not granting a waiver based on Advance's allegations of inadvertent errors in its original engineering analysis, nor was it, as Advance had urged, giving any consideration to comparisons of the bid withdrawal payment amount with forfeitures assessed in other contexts.⁴² Rather, the Bureau found that considering both the absolute and relative amount of the final bid withdrawal payment, it was "higher than necessary to serve the purpose of the rule," and therefore granted Advance a limited waiver of section 1.2104(g).⁴³

³⁵ 47 C.F.R. § 1.2104(g). See Joint Parties PFR at 6, 10; Nassau PFR at 1, 8; Connoisseur AFR at 1, 3.

³⁶ Advance Acquisition, Inc. Request for Waiver of Bid Withdrawal Payment, *Order*, 22 FCC Rcd 18846 (WTB 2007) ("*Advance*").

³⁷ *Order*, 23 FCC Rcd at 10398-99 ¶ 20.

³⁸ *Advance*, 22 FCC Rcd at 18847 ¶ 3.

³⁹ After taking into account funds on deposit with the Commission, Advance owed the Commission \$4,410,500. *Id.* at 18848 ¶ 4.

⁴⁰ *Id.* at 18848-49 ¶ 5.

⁴¹ *Id.* at 18850 ¶ 7.

⁴² *Id.* at 18,852 ¶¶ 11-12.

⁴³ *Id.* at 18850 ¶ 7. The Bureau found that nothing in Advance's circumstances justified a waiver of the interim bid withdrawal payment, and therefore, did not waive the rule with regard to the interim bid withdrawal payment already on deposit with the Commission. *Id.* at 18853 ¶ 15.

13. The petitioners here argue that their requests for reduction or elimination of their bid withdrawal payments were similar to the request at issue in *Advance*, but were treated differently.⁴⁴ They acknowledge that Advance owed more (in some cases, substantially more) than the amount of the bid withdrawal payment that any of the petitioners was assessed, but argue that, expressed as a percentage of the subsequent winning bid, some of their bid withdrawal payments represent a higher percentage than Advance's bid withdrawal obligation did.⁴⁵ The petitioners also characterize as minor the factual differences between their circumstances and those of Advance and contend that those differences have no relation to the purposes of the rule, the Commission's rules in general, or the Communications Act of 1934, as amended.⁴⁶ Petitioners therefore claim that relief should be granted because, as in *Advance*, application of the withdrawal payment rule would impose an excessive burden unnecessary to achieve the purpose of the rule.⁴⁷

14. We believe that the Bureau's decision in *Advance* failed to give appropriate consideration to our standards for issuing waivers of our rules. It has long been recognized that waiver applicants face "a high hurdle even at the starting gate."⁴⁸ While we are obligated to give waiver requests a "hard look,"⁴⁹ waiver applicants are obligated to demonstrate "good cause" for obtaining a waiver of our rules.⁵⁰ Under this standard, waivers are appropriate only if "both (i) special circumstances warrant a deviation from the general rule, and (ii) such deviation will serve the public interest."⁵¹ Because the essential premise of a waiver is "the assumed validity of the general rule,"⁵² the grant of a waiver must "not undermine the policy served by the rule."⁵³ As noted below, the mere size of the bid withdrawal payment cannot serve to satisfy the requirement of the kind of special circumstances that warrant a deviation from the general rule. Moreover, the grant of a waiver on that basis would not be in the public interest, because it would substantially undermine the efficient operation of the auction mechanism in accomplishing the statutory objectives.⁵⁴ Accordingly, as the Bureau properly concluded,⁵⁵ the petitioners have failed to

⁴⁴ Joint Parties PFR at 4-10; Connoisseur AFR at 9-15; Nassau PFR at 5.

⁴⁵ Joint Parties PFR at 9; Connoisseur AFR at 14-15; Nassau PFR at 5.

⁴⁶ Joint Parties PFR at 7; Connoisseur AFR at 13.

⁴⁷ Joint Parties PFR at 8-10; Connoisseur AFR at 14-15; Nassau PFR at 5-6.

⁴⁸ See, e.g., Request for Review of Decisions of the Universal Service Administrator by Joseph M. Hill Trustee in Bankruptcy for Lakehills Consulting, LP, 26 FCC Rcd 16586 (2011), citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

⁴⁹ *WAIT Radio*, 418 F.2d at 1157.

⁵⁰ 47 C.F.R. § 1.3.

⁵¹ Lazo Technologies, Inc., *Order on Reconsideration*, 26 FCC Rcd 16661, 16668 & n.56 (2011), citing *NetworkIP, LLC v. FCC*, 548 F.3d 116 (D.C. Cir. 2008), and *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990). We note that 47 C.F.R. § 1.925 employs a slightly different formulation of the standard for waiver. However, this rule applies only to licenses or applications in the Wireless Radio Services, which do not include FM applications. See *id.* §§ 1.901, 1.907; *Order*, 23 FCC Rcd at 10397 n.53. See also Nassau PFR at 6 n.15. In any event, this rule applicable to wireless services requires "substantially the same" showing as 47 C.F.R. § 1.3. See *Order*, 23 FCC Rcd at 10397 n.53.

⁵² *WAIT Radio*, 418 F.2d at 1158.

⁵³ See, e.g., Review of the Emergency Alert System, *Memorandum Opinion and Order*, 25 FCC Rcd 16376, 16379 ¶ 8 & n.28 (2010) (citing *WAIT Radio*).

⁵⁴ See n.8 *supra*.

⁵⁵ *Order*, 23 FCC Rcd at 10398-99 ¶ 20.

meet the “high hurdle” of establishing that they comply with either of the requirements for waiver of section 1.2104(g)(1) of the rules.⁵⁶

15. Upon review of the petitioners’ pleadings, we conclude that the standard the Bureau applied in *Advance* as a basis for waiver of the Commission’s bid withdrawal requirement did not meet these requirements. While we believe the Bureau rightfully rejected in *Advance* the special circumstances claimed for the waiver (e.g., the faulty software on which the bidder had claimed to rely), we disagree that the two characteristics deemed by the Bureau to make the bid withdrawal payment “excessively high” – the bid withdrawal payment exceeding \$4 million and representing more than 200 percent of the subsequent winning bid – were “special circumstances” tailored to the policy of the auction rules or otherwise would “serve the public interest.”⁵⁷ Nothing in our auction rules includes any policy to avoid “excessively high” bid withdrawal payments, based upon size of the payment. In the 1994 *Competitive Bidding Second Report and Order*, the Commission noted only that the payments should not be set so high as to “discourage the efficient aggregation of licenses” or compel the bidder to keep the high bid and re-sell the license in the after-market.⁵⁸ *Advance*, however, involved no showing of either of these risks. The Bureau’s focus was solely on the size of the payment, both as above a certain dollar figure and as a percentage of the subsequent winning bid.

16. Moreover, we believe that any waiver policy based simply on the size of the payment would unduly encourage bidders in any future auctions where the Commission deems withdrawals may be appropriate⁵⁹ to either engage in strategic behavior to “game” the system or otherwise fail to carefully “consider the costs imposed on the auction process” in determining to place or withdraw their bids.⁶⁰ As the petitioners themselves point out,⁶¹ such a policy could create an incentive for bidders to place “wildly high” bids that they intend later to withdraw, and subsequently argue that their withdrawal payment obligation should be waived in whole or in part simply because of its size. That result would not serve the public interest, and would be at odds with the purposes of the rule to promote accurate information in the bidding process about the value of the licenses at auction, maximize opportunities for others to adjust their strategies in light of the bidding process, and thereby lead to a valuation of licenses that promotes their most efficient use.

17. We believe that our pre-*Advance* bid withdrawal decisions outline a much more objective waiver policy with respect to bid withdrawal payments that best promotes the purposes of the auction

⁵⁶ 47 C.F.R. § 1.2104(g)(1).

⁵⁷ As the petitions in this case argue, the decision in *Advance* would not, for example, explain why, in smaller markets, bid withdrawal payments that are less than \$4 million, but more than 200 percent of the ultimate winning bid, could not also be considered “excessively high.”

⁵⁸ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373 ¶¶ 148-49.

⁵⁹ As petitioners point out, the Bureaus determined subsequent to Auction 37 that “bid withdrawals are unnecessary in FM broadcast auctions.” Connoisseur AFR at 22 & n.58, quoting Auction of FM Broadcast Construction Permits Scheduled for March 7, 2007; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 70, AU Docket No. 06-170, *Public Notice*, 21 FCC Rcd 12957, 12995 ¶ 163 (WTB/MB 2006). See also Auction of FM Broadcast Construction Permits Rescheduled for April 23, 2013; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 94, AU Docket No. 12-239, *Public Notice*, 27 FCC Rcd 14299, 14339-40 ¶ 162 (WTB/MB 2012) (“*Auction 94 Procedures Public Notice*”). In wireless auctions, however, the Bureau has found that bid withdrawals can maximize opportunities to bid for licenses in complementary markets. See *Order*, 23 FCC Rcd at 10399 & nn.69, 71.

⁶⁰ *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2374 ¶ 151.

⁶¹ Connoisseur AFR at 13 (questioning the relevance of the \$4 million threshold established by the Bureau in *Advance*); Joint Parties PFR at 9 n.19 & n.20 (arguing the \$4 million / 200 percent standard is arbitrary and that the Joint Parties merit a waiver as much as *Advance* did).

rules and the integrity of the auction process, while allowing for waivers in special circumstances where the application of the rule does not serve its purposes or otherwise does not serve the public interest.⁶² We recognize that bid withdrawals can in some cases result in costly bid withdrawal payments, but as noted above, the rules are intended to have that consequence, so that they compel bidders to consider carefully the costs imposed on the auction process of withdrawing bids after a round has been completed.

18. The payments owed here were, moreover, a direct consequence of each bidder's own decisions and actions, including its bidding strategies, after being fully informed of the auction rules and procedures that would apply to its bids. Neither our auction rules, nor any actions of Commission staff, caused the petitioners to make the specific bids they submitted on the subject construction permits in Auction 37. Only a bidder can assess the value to it of the license/construction permit and make the decision to submit a specific bid amount. Under such circumstances, it is fair to both the bidder withdrawing its bid, and to the other bidders who formulated and submitted their bids under the same rules and constraints, to hold all bidders to the consequences of their bidding decisions. We therefore disagree with the Bureau's finding in *Advance* that a bid withdrawal payment can be so "excessively high" as an absolute and relative amount to warrant, on that basis alone, a waiver of the rule. Accordingly, we decline to follow the factors applied by the Bureau in *Advance* and expressly overrule the Bureau's analysis in that decision.⁶³ We also affirm the Bureau's decision denying waiver of the bid withdrawal rule for the petitioners now before us on the grounds set forth in this Memorandum Opinion and Order.

B. Further Claims Made by Connoisseur and Nassau

19. In addition to their argument that they are similarly situated to, and therefore should be treated similarly to, the petitioner in *Advance*, Connoisseur and Nassau make further claims in their efforts to reduce or eliminate their bid withdrawal payments. As discussed below, we find these additional arguments unpersuasive, as they fail to present the kind of special circumstances and public interest showing that warrant the extraordinary relief of a waiver of section 1.2104(g)'s bid withdrawal payment requirement.

1. Connoisseur's Additional Claims

20. Connoisseur states that it withdrew the provisionally winning bid during Auction 37 to be able to bid on another permit that had become available after another bidder withdrew its provisionally winning bid.⁶⁴ Connoisseur claims it simply desired one permit more than the other and that it could not

⁶² For example, the Commission granted a waiver when the withdrawing bidders mistakenly added additional digits to their bids, increasing their bids several fold (e.g., \$22,680,020 instead of \$2,268,002) due, in part, to confusion possibly caused by the design of the Commission's then-existing electronic bidding system. *Atlanta Trunking Associates, Inc. and MAP Wireless L.L.C.; Georgia Independent PCS Corporation, Memorandum Opinion and Order*, 12 FCC Rcd 6382 (1997) ("*Atlanta Trunking Associates*"). While updates to the Commission's auction system now prevent a similar problem from occurring, the case demonstrates the type of narrow circumstances where the Commission has determined a waiver is warranted. In *Atlanta Trunking Associates*, the Commission also cautioned bidders that they would be faced with a heavy burden to show a mistaken bid and that it is unlikely the Commission will make similar exceptions for such mistaken bids in the future. *Id.*, 12 FCC Rcd at 6388-89 ¶ 12.

⁶³ It is well established that the Commission is not bound by the Bureau's decision in *Advance*. See, e.g., *Comcast Corp. v. FCC*, 526 F.3d 763, 769-70 (D.C. Cir. 2008); *Vernal Enterprises, Inc. v. FCC*, 355 F.3d 650, 660-61 (D.C. Cir. 2004); *Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 961-62 (D.C. Cir. 1991); *Comex, Inc., Memorandum Opinion and Order*, 6 FCC Rcd 3370, 3372 ¶ 14 (1991) (addressing claim of inconsistency between two Bureau decisions under *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)). See also *Alpine PCS, Inc., Memorandum Opinion and Order*, 25 FCC Rcd 469, 479-80 nn.89-90, *aff'd*, 404 Fed. Appx. 508 (D.C. Cir. 2010) (distinguishing *Advance* and noting that Commission "has not yet had an opportunity to consider the issue presented to the Bureau" in that case).

⁶⁴ Connoisseur AFR at 17.

bid on both because of its reduced bidding eligibility at that stage of the auction.⁶⁵ Connoisseur maintains its previous bid was not insincere or submitted for strategic purposes, and adds that, because of its withdrawal, both permits (i.e., the one on which it withdrew its provisionally winning bid and the one on which it re-bid and eventually won) were won by the parties that most highly valued them.⁶⁶ Therefore, Connoisseur concludes that it should not be “penalized” by application of the bid withdrawal payment rule and asserts that waiver of the withdrawal payment requirement would serve the underlying policies and goals of the Congressional mandate for the use of competitive bidding and the Commission’s competitive bidding rules.⁶⁷

21. We disagree with Connoisseur’s arguments and conclusions. First, we decline to overturn the Bureau’s waiver denial based on Connoisseur’s claimed motivations for withdrawing its bid. Such motivations are generally unverifiable. Hence, the Commission designed an objective rule that does not take into account a bidder’s reasons for the withdrawal; instead, a payment is automatically owed once a bid is withdrawn and the subsequent winning bid is lower.⁶⁸ Even if we were to consider Connoisseur’s asserted motives for withdrawing the bid, a desire to bid on another permit would not be the type of a “special circumstance” to warrant a waiver of the rule, because it would apply to many situations in many auctions for many licenses, and encouraging such activity would not serve the purposes of the rule.⁶⁹ According to Connoisseur, a bid withdrawal that frees up bidding units to allow a higher bid on other permits is in the public interest because “it serves to increase the amount obtained in the auction.”⁷⁰ We disagree. We do not believe that premising waivers on a *post hoc* argument about whether bid withdrawal “actually benefited the U.S. Treasury,”⁷¹ considering its collateral effects on other bidders, would be either practicable or verifiable. In any event, Connoisseur’s focus on maximizing revenues misstates the Commission’s goal of obtaining “a portion of the value” of the spectrum⁷² and disregards the many other purposes behind the competitive bidding rules, including the objective of producing a fair and efficient auction.

22. We also disagree with Connoisseur’s claim that it should not have to comply with the bid withdrawal payment requirement because its withdrawal resulted in awarding the two construction permits to entities that valued them the most. Here again, this argument advances neither special circumstances nor the public interest. An auction with consistently revealed price information is the best mechanism to determine the parties that most value the spectrum.⁷³ As the Bureau stated in the

⁶⁵ *Id.* at 4-5.

⁶⁶ *Id.* at 17-18.

⁶⁷ *Id.* at 16-19.

⁶⁸ 47 C.F.R. §§ 1.2104(g). Thus, we disagree with Connoisseur’s claim that it is being “penalized.” A bid withdrawal payment is not a punishment, but rather, as noted above, a condition the Commission has determined is a necessary safeguard for the interests of the other bidders in an auction as well as those of the government in promoting the dissemination of accurate information about the value of the markets under auction, affording opportunities to implement bidding strategies based on that information, and thus more closely approximating the value and thereby the most efficient use of the spectrum. *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2373 ¶ 147.

⁶⁹ *Order*, 23 FCC Rcd at 10404 ¶ 34.

⁷⁰ *Id.*

⁷¹ Connoisseur AFR at 20.

⁷² *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2349 ¶¶ 2-3 (quoting 47 U.S.C. § 309(j)(3)(C)). This limited goal does not mean “that [the Commission’s] purpose is to maximize auction revenue.” *Id.*, 9 FCC Rcd at 2361 ¶¶ 72-73.

⁷³ See, e.g., Letter from Margaret W. Wiener, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, to Gregory M. Schmidt, Vice-President, Banks Broadcasting, Inc. and Jonathan D. Blake, Counsel to Banks Broadcasting, Inc., 18 FCC Rcd 10431, 10434-37 (WTB/ASAD 2003) (rejecting claim that
(continued....)

underlying order, “[i]n addition to the obvious possible harm of keeping the second highest bidder from winning the license which it should have been able to win, inflated bidding may adversely affect auction participants in more subtle ways,” including distorting price information and affecting the bidding on other licenses.⁷⁴ Therefore, when the Commission decides to allow bidders a limited number of withdrawals during a particular auction, it relies on the bid withdrawal payment requirement to minimize the potential harms of a bid withdrawal and to safeguard the interests of the other bidders by deterring bidding strategies that may lead to distortionary withdrawals. Uniform application of all the auction rules and procedures, including the bid withdrawal payment rule, best promotes the integrity of the auction process in all but the most unusual or unique circumstances.

23. Connoisseur claims that its circumstances were in fact “unique and unusual” because of the “unforeseen rapid and extreme devaluation of FM construction permits in one year” and the subsequent use by the Commission of procedures in certain auctions of FM construction permits that found bid withdrawals unnecessary.⁷⁵ We agree with the Bureau’s analysis addressing these claims. Specifically, as the Bureau noted, the “value of licenses in other services can and does fluctuate from one auction to another because of factors similar to those involved in the FM broadcast service,” and “the possibility that license values will fluctuate over time is a risk that bidders in all auctions face, regardless of the service involved.”⁷⁶ Bidders were aware, or should have been aware, of the consequences and potential risks when placing their bids. Moreover, we note that Connoisseur’s commonly-owned sister company placed the winning bid on the Flasher, ND permit in the subsequent auction with a winning bid that was lower than the withdrawn bid.⁷⁷ Connoisseur’s bid withdrawal payment reflects the difference between the bid it withdrew and the subsequent winning bid of its sister company. Granting Connoisseur a waiver in this situation would effectively relieve it of its bid obligation in Auction 37, so that essentially the same parties-in-interest could obtain the same permit for their lower bid in Auction 62. In this case, enforcing the bid withdrawal payment requirement would promote, not frustrate, the underlying purposes of the rule.

24. We also reject Connoisseur’s contention that the Bureaus “contributed” to Connoisseur’s plight by providing bidders with the flexibility to withdraw bids in Auction 37.⁷⁸ Connoisseur notes that in the most recent FM auctions, the Bureaus adopted procedures restricting such flexibility by prohibiting bid withdrawals altogether after concluding “that bid withdrawals are unnecessary in FM broadcast auctions.”⁷⁹ Had such a prohibition been in place in Auction 37, Connoisseur argues, it would not have been subject to a bid withdrawal payment liability. We decline Connoisseur’s invitation at this late date to reexamine whether the Bureaus should have adopted a different approach for Auction 37. The Bureaus’ policy in this regard evolved over the course of several auctions. The Bureaus allowed less flexibility in the second FM auction (Auction 62) than in the first – Auction 62 bidders were permitted to

(...continued from previous page)

public interest would be served by offering unsold licenses to auction’s second-highest bidder rather than re-auctioning them).

⁷⁴ *Order*, 23 FCC Rcd at 10400-01 ¶ 25.

⁷⁵ Connoisseur AFR at 21-22. Connoisseur asserts that it would be only “equitable” to rescind the assessed withdrawal payment because “of the use of a process that the Commission itself now recognizes was flawed.” *Id.* at 22.

⁷⁶ *Order*, 23 FCC Rcd at 10402 ¶ 28.

⁷⁷ *See* Connoisseur AFR at 6.

⁷⁸ Connoisseur AFR at 21.

⁷⁹ *Id.*, citing Auction of FM Broadcast Construction Permits Scheduled for March 7, 2007; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 70, *Public Notice*, 21 FCC Rcd 12957 (WTB/MB 2006) (“*Auction 70 Procedures Public Notice*”).

withdraw bids in only one round.⁸⁰ In establishing the rules for the third FM auction (Auction 70), the Bureaus prohibited bid withdrawals entirely, having determined that bidders do not need to aggregate FM permits at auction and that there was a possibility that bid withdrawals may have been used for anticompetitive purposes in previous FM broadcast auctions.⁸¹ It is good practice for the Bureaus to adjust auction procedures when experience or new evidence indicates that the benefits of allowing a procedure are outweighed by the possible harm to the auction. The Bureaus' decision to prohibit bid withdrawals in subsequent FM broadcast auctions is, however, irrelevant to determining the uniqueness of Connoisseur's circumstances in Auction 37. Connoisseur withdrew bids as permitted by the procedures established for Auction 37, and it was assessed payments as required by the procedures established for Auction 37. There is nothing unique in these circumstances. We find that Connoisseur fails to demonstrate any error in the *Order's* analysis or conclusions in this regard and thus we deny its application for review.

2. Nassau's Additional Claims

25. Nassau claims the Bureau erred when it found that Nassau's bid was not a mistake similar to those found in *Atlanta Trunking Associates*.⁸² Nassau argues that, only after it placed bids on two permits, did it realize it could not hold both, due to the Commission's multiple ownership rules.⁸³ Nassau characterizes this late realization as a "mistake" akin to typographical errors made in submitting bids, and argues that the Bureau failed to consider the complexity of determining broadcast eligibility when it determined that Nassau's bid was not a mistake similar to that in *Atlanta Trunking Associates*.⁸⁴

26. We disagree with Nassau's comparison. Nassau knew, or should have known, prior to placing its bids how the Commission's multiple ownership rules might affect its bidding.⁸⁵ The *Auction 37 Procedures Public Notice* is replete with warnings to bidders to become familiar with FM broadcast licensing and competitive bidding rules.⁸⁶ The petitioners in *Atlanta Trunking Associates*, in

⁸⁰ Auction of FM Broadcast Construction Permits Scheduled for November 1, 2005; Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Procedures for Auction No. 62, *Public Notice*, 20 FCC Rcd 10492, 10533 (WTB/MB 2005) (noting that the Bureaus detected bidder conduct in previous auctions that may have constituted anti-competitive behavior through the use of bid withdrawals).

⁸¹ *Order*, 23 FCC Rcd at 10404-05 ¶ 35; see also *Auction 70 Procedures Public Notice*, 21 FCC Rcd at 12995 ¶ 163; *Auction 94 Procedures Public Notice*, 27 FCC Rcd at 14339-40 ¶ 162.

⁸² Nassau PFR at 4.

⁸³ *Id.*

⁸⁴ *Id.* at 4, citing *Atlanta Trunking Associates*.

⁸⁵ An application filed by Nassau with regard to a separate broadcast radio station demonstrates that Nassau was well-versed in the Commission's multiple ownership rules while bidding in Auction 37 was ongoing. On November 9, 2004, Nassau amended an application with regard to another of the more than fifty full service AM and FM radio stations that it owns. That "Application for a Construction Permit for Commercial Broadcast Station" (FCC Form 301) for AM station WNJE, Flemington, NJ was amended, among other purposes, to "demonstrate compliance with the new multiple ownership rules." See File No. BP – 20040112ABD, Exhibit 1 (filed Nov. 9, 2004).

⁸⁶ See, e.g., *Auction 37 Procedures Public Notice*, 19 FCC Rcd at 10575 ("Prospective bidders must familiarize themselves thoroughly with the Commission's rules relating to the FM broadcast service in Title 47, Part 73 of the Code of Federal Regulations.") and 10577-78 ("potential bidders are strongly encouraged to review all underlying Commission orders") The Bureaus considered but rejected eligibility restrictions based on current ownership, noting that such would "constitute a de facto amendment of the Commission's broadcast ownership rules," citing the local radio ownership rule. *Id.* at 10581 & n.43. Finally, the Bureaus also disabled the bidding system's "Save All Licenses" feature for permit selection in Auction 37, specifically for bidders to carefully choose the permits on which they intended to bid. *Id.* at 10583.

contrast, had made purely typographical errors in entering their bids.⁸⁷ More importantly, the Commission found in *Atlanta Trunking Associates* that “[c]ommon to all three parties is their demonstration that the Commission’s remote bidding system, which placed a zero in the bid submission field, may have contributed to some confusion causing the clerical error at issue.”⁸⁸ Nothing comparable exists in Nassau’s facts. Furthermore, if we were to grant a waiver based on the “mistake” of misunderstanding or failing to take into account the Commission’s rules, as Nassau suggests, we would open the door to any number of excuses for a withdrawing bidder. Bidders must know the Commission’s rules prior to placing bids. Failing to understand the Commission’s licensing rules or take them into account when placing a bid does not serve to distinguish Nassau’s circumstances from those of any other bidder subject to those rules, or create a basis upon which to waive the bid withdrawal payment rule.

27. Nassau also asserts that the Bureau failed to address its argument that it had no reasonable alternative to withdrawing one of its bids.⁸⁹ Nassau claims it had to withdraw one of its bids because it failed to take into account the operation of the Commission’s broadcast multiple ownership rule and “the inability to secure government approvals” necessary to construct the FM broadcast stations.⁹⁰ Responding to its view of the Bureau’s conclusion in the underlying order that Nassau knew, or should have known, “how the [FM broadcast] rules and engineering for these broadcast licenses intersected,” Nassau argues that such facts are “not relevant with respect to evaluating Nassau’s reasonable alternatives.”⁹¹

28. We disagree with Nassau’s analysis and conclusion. Its obligation to comply with the FM broadcast rules was no different from that of any other bidder, and it has made no demonstration of why a waiver based on its failure to adequately account for those rules would promote any of the policies underlying the Commission’s auction rules. As we have noted above, the *Auction 37 Procedures Public Notice* is replete with warnings to bidders to become familiar with FM broadcast licensing and competitive bidding rules.⁹² Therefore, when submitting its bids, Nassau should have taken into account the numerical limitations prescribed by Commission’s broadcast multiple ownership rule.⁹³ Once Nassau determined that it held a provisionally winning bid on a permit that it was not eligible to acquire, withdrawing that bid may well have been its most reasonable alternative.⁹⁴ Under section 1.2104 (g) of our rules, however, the opportunity to withdraw a bid during an auction comes with a payment obligation under certain circumstances. The withdrawal payment was thus an integral part of Nassau’s “reasonable

⁸⁷ As noted above n.62 *supra*, the petitioners in *Atlanta Trunking Associates* mistakenly added additional digits to their bids, increasing their bids several fold (e.g., \$22,680,020 instead of \$2,268,002) due, in part, to confusion possibly caused by the design of the Commission’s then-existing electronic bidding system.

⁸⁸ *Atlanta Trunking Associates*, 12 FCC Rcd at 6388 ¶ 11.

⁸⁹ Nassau PFR at 7.

⁹⁰ *Id.* at 3-4. The Commission’s broadcast multiple ownership rule specifically prescribes a limit on the number of broadcast station licenses that a person or single entity may hold in a radio market. See 47 C.F.R. § 73.3555.

⁹¹ Nassau PFR at 7.

⁹² See n.86 *supra*.

⁹³ See 47 C.F.R. § 73.3555.

⁹⁴ The Commission’s competitive bidding rules also provided Nassau with the alternative of waiting until the auction closed and then defaulting on any permit that it was ineligible to hold. The Commission recognizes, however, that a default is likely to be more harmful to the auction process than a bid withdrawal that occurs prior to the close of an auction, and accordingly has established a more onerous payment obligation upon a defaulting bidder. See *Competitive Bidding Second Report and Order*, 9 FCC Rcd at 2374 ¶ 154. Specifically, if a winning bidder defaults, it will be subject to both a deficiency payment, equal to the difference between the amount of the bidder’s bid and the amount of the winning bid the next time a construction permit covering the same spectrum is won in an auction, plus an additional payment equal to a percentage of the defaulter’s bid or of the subsequent bid, whichever is less. 47 C.F.R. § 1.2104(g)(2).

alternative” with respect to the problem that it had created for itself. Nassau has not met its burden of demonstrating good cause for waiver of the bid withdrawal payment just because it put itself in a position where it had to withdraw a bid.

29. As discussed above, withdrawn bids can have adverse consequences for the auction as a whole, and, to minimize those consequences, the bid withdrawal payment is intended as a disincentive. Among other things, the bid withdrawal rule may help deter a bidder from bidding up the price of multiple permits in a particular area and then withdrawing in the late stages of the auction, in an effort to keep permits out of the hands of competitors. In the present case, where the Commission’s multiple ownership rule specifically limits the number of broadcast radio station licenses that a person or entity may hold in a radio market,⁹⁵ the bid withdrawal rule is useful in deterring an entity from insincere or anti-competitive bidding on two permits that it cannot simultaneously hold, with the intent of withdrawing one of the bids later. While we need not inquire into Nassau’s motives underlying its withdrawn bids,⁹⁶ enforcement of the bid withdrawal rule, rather than waiver of the rule, is appropriate particularly when the withdrawal is viewed against the backdrop of the multiple ownership restriction. Thus, the factual circumstances Nassau presents provide no justification for waiving the rule.

30. Accordingly, we reject Nassau’s argument that it should be granted a waiver because it had no reasonable alternative to withdrawing one of its bids, and we deny Nassau’s petition for reconsideration.

IV. CONCLUSION

31. Petitioners’ claim that they should be treated similarly to petitioner in *Advance* is unavailing because we overrule and decline to follow the Bureau’s analysis in that case. Rather, we conclude that petitioners have failed to demonstrate either the extraordinary circumstances, or the public interest basis, required for the grant of a waiver of the bid withdrawal payment rule. Moreover, we find the additional arguments by Connoisseur and Nassau without merit. Therefore, we deny the petitioners’ requested relief.

V. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405(a), and section 1.106 of the Commission’s rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed by College Creek Broadcasting, Inc., Cumulus Licensing LLC, and Barry P. Lunderville, on August 1, 2008, IS DENIED.

33. IT IS FURTHER ORDERED pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c), and section 1.115 of the Commission’s rules, 47 C.F.R. § 1.115, that the Application for Review filed on behalf of Connoisseur Media, LLC, on August 1, 2008, IS DENIED.

⁹⁵ See 47 C.F.R. § 73.3555.

⁹⁶ See para. 4 and n.9 *supra* (bid withdrawal rule is to be enforced regardless of bidder motives).

34. IT IS FURTHER ORDERED pursuant to Sections 4(i) and 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405(a), and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, that the Petition for Reconsideration filed on behalf of Nassau Broadcasting Holdings, Inc., on August 1, 2008, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

Auction 37 Withdrawn Bids Relevant for FCC 13-7

Petitioner	Permit	Amount of Withdrawn Bid in Auction 37	Winning Bid in Auction 62	Final Bid Withdrawal Payment	Amount of Interim Payment	Amount Owed after Interim Payment	Total Amount Paid to Date
Connoisseur Media, LLC (formerly Bigglesworth Broadcasting, LLC)	Flasher, ND	\$893,750	\$284,000	\$609,750	\$26,813	\$582,937	\$609,750
Barry P. Lunderville	Groveton, NH	\$422,000	\$178,000	\$244,000	\$12,660	\$231,340	\$12,660
College Creek Broadcasting, Inc.	Windsor, NY	\$1,339,000	\$545,000	\$794,000	\$40,170	\$753,830	\$40,170
College Creek Broadcasting, Inc.	Blue Lake, CA	\$1,026,000	\$361,000	\$665,000	\$30,780	\$634,220	\$30,780
Cumulus Licensing, LLC	Cannon Ball, ND	\$1,461,000	\$124,000	\$1,337,000	\$43,830	\$1,293,170	\$1,337,000
Nassau Broadcasting Holding, Inc.	Whitefield, NH	\$822,000	\$196,000	\$626,000	\$24,660	\$601,340	\$24,660